134 (1)

Supreme Court, U.S.
FILED

No. 09-107 JUL 23 2009

OFFICE OF THE CLERK

In The

Supreme Court of the United States

RALPH CORDY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES MARTIN DAVIS, ESQ.
500 Farnam Plaza
1623 Farnam Street
Omaha, Nebraska 68102
Telephone: (402) 341-9900
Facsimile: (402) 341-8144

Attorney for Petitioner Ralph Cordy

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Sixth Amendment to the Constitution of the United States give a defendant in a criminal case who has good cause the right to discharge his lawyer and retain a new one without interference from the trial court?

PARTIES TO THE PROCEEDING

Petitioner (defendant and appellant below):

Ralph Cordy

Represented by James Martin Davis, Esq., 500 Farnam Plaza, 1623 Farnam Street, Omaha, Nebraska 68102

Respondent (plaintiff and appellee below):

The United States of America

Represented by Elena Kagan, Esq., Solicitor General of the United States of America, 950 Pennsylvania Ave., NW, Washington, D.C. 20530-0001

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CITATIONS FOR OPINIONS BELOW 1

BASIS FOR JURISDICTION IN THIS COURT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING CERTIORARI 8

1. The Sixth Amendment right to counsel of choice commands that the accused be allowed to be defended by the counsel he believes best 8

2. A trial court's concern for the administration of justice must give way to the Defendant's Sixth Amendment right to effective counsel 10

CONCLUSION 12

Appendix A: Opinion of the Court of Appeals for the Eighth Circuit filed on March 25, 2009 (*United States of America v. Ralph Cordy*, 560 F.3d 808 (8th Cir. 2009)) ..... App. 1

Appendix B: District Court Memorandum and Order dated May 27, 2007 ..... App. 20

TABLE OF CONTENTS – Continued

Page

Appendix C: District Court Judgment in a Criminal Case dated November 1, 2007 ..... App. 32

Appendix D: Motion to Withdraw of Attorney Steven Lefler filed on July 10, 2007 ..... App. 45

TABLE OF AUTHORITIES

Page

CASES

Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978) 9

United States v. Bowe, 221 F.3d 1183 (11th Cir. 2000) 9

United States v. Cordy, 560 F.3d 808 (8th Cir. 2009) 1

United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) 8

Wheat v. United States, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) 9, 10

CONSTITUTIONAL PROVISIONS AND STATUTES

Sixth Amendment to the Constitution of the United States ..... *passim*

18 U.S.C. § 2252(a)(4)(B) 1, 2

28 U.S.C. § 1254(1) 1

CITATIONS FOR OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (Appendix A) is reported at 560 F.3d 808 (8th Cir. 2009). The decision of the District Court dated May 27, 2007 (Appendix B), and the District Court's Judgment in a Criminal Case (Appendix C), were not reported.

BASIS FOR JURISDICTION IN THIS COURT

The Eighth Circuit Court of Appeals filed its opinion on March 25, 2009. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on writ of certiorari the opinion of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Petitioner, as Defendant below, was charged in a one-count indictment with possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). The Petitioner alleges that the District Court denied his Sixth Amendment right to counsel for his defense. The Sixth Amendment to the Constitution of the United States of America provides as follows:

> In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

> previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The Defendant below, Ralph Cordy, was indicted for violating 18 U.S.C. § 2252(a)(4)(B), possession of child pornography. Thereafter, Mr. Cordy privately retained defense counsel, Steven Lefler, a Nebraska lawyer, to represent him. For eight months, Mr. Cordy believed he was being ably represented by his lawyer. Knowing little or nothing about federal criminal practice, Mr. Cordy had no reason to think otherwise.

However, on May 22, 2007, the district court issued an order severely chastising the Defendant's lawyer for a litany of deficiencies in his representation of the Defendant. In this nine-page order, the district court judge vociferously criticized Mr. Lefler for his failure to file motions timely, his failure to comply with local rules, for being unavailable for hearings and trial dates, for having no excuse for being unfamiliar with relevant case law and theories of defense, for filing a frivolous *Daubert* motion which was not supported by a brief and which contained no specifics to this case or to any evidence he wanted to

challenge, for not following proper procedures with respect to obtaining discovery materials, and for his failure to cause his defense expert to independently analyze the physical evidence in this case in a timely manner.

At some unknown date thereafter, Mr. Cordy obtained and read this trial court order. Up until this time, he had relied on his lawyer's competence to adequately perform his duties and assumed his lawyer was doing his job. It was only after reading the trial judge's order which contained the harsh and extensive criticism that he learned for the first time about the numerous deficiencies in his lawyer's performance.

Mr. Cordy then had a pointed conversation with his lawyer. The lawyer admitted to making all of the mistakes the trial judge had pointed out in her order, so Mr. Cordy immediately discharged the attorney. He also asked the lawyer to file a motion to withdraw as his counsel of record so he could retain a new lawyer.

The Defendant then attempted to obtain new counsel. He had arranged with a Virginia attorney to take over the case, but that attorney backed out at the eleventh hour. Steven Lefler, the original defense attorney, dutifully filed his Motion to Withdraw and advised the trial court that he had been discharged. A hearing was scheduled on this motion for July 16, 2007, which was only six days before the trial date.

Mr. Cordy had discharged his lawyer as a direct result of the trial judge's written criticism of the lawyer and because the lawyer had admitted his failures to his client. Nonetheless, despite the fact that the Defendant fired his lawyer because of an order issued by the trial court, that same court refused to let the Defendant discharge this lawyer and retain another one. Instead, the trial judge, after refusing to allow the Defendant to obtain new counsel, made the Defendant proceed to trial with a lawyer who was no longer of his own choosing and whom he had an absolute right to discharge.

At the hearing, Mr. Cordy told the judge he needed and wanted a new lawyer. He made reference to the trial judge's earlier order which cited the motions that his attorney had untimely filed and that were denied, and also referenced his lawyer's failure to get the necessary evidence to his expert for a timely examination and opinion. The Defendant was particularly concerned because, while he had retained the expert, that expert would have no admissible opinions to offer because his attorney had never forwarded the evidence the expert needed to review.

The Defendant's attorney admitted to the trial judge at the hearing that his client was frustrated with him and had fired him. He admitted he had failed to get the evidence to the expert for examination and that the expert had complained about that. He also admitted, on the record: "I screwed up the deadline for which I apologize to Mr. Cordy." He admitted the Defendant had lost confidence in him

because: "I screwed up. I didn't know about the line of cases. . . . But regardless he has lost confidence in me." He also admitted he had "messed up" in other areas as well.

The Defendant had every right to lose confidence in his lawyer. Besides its criticism of the attorney in its written order dated May 22, 2007, the trial court had criticized the attorney in open court at an earlier hearing on April 17, 2007. At this earlier hearing, the trial judge had expressed concern about the attorney's ability to work on this case. The trial judge also, on the record, expressed concern about the attorney's unwillingness to represent the Defendant because of the lawyer's statements that he was getting into some other line of work, that his life was seemingly in a state of flux, and about his impending move from Nebraska to Arizona.

At the hearing on April 17, 2007, the trial judge advised the Defendant's attorney that "the Court should expect some reasonable availability of Counsel." As a result of the attorney's seemingly perpetual unavailability, the Court ordered that he "not take any more cases in this Court." She also told the attorney that she was "not going to be granting you any more extensions in any more cases knowing what your schedule is like."

In summary, the Defendant's lawyer had admitted on the record that he had "messed up" and "screwed up" in a number of important particulars. On April 17, 2007, the trial court had criticized the

attorney in open court and in the presence of his client. Then, on May 22, 2007, the trial court excoriated the attorney again, this time memorializing those criticisms in a written order which was subsequently read by the client.

Despite all of this condemnation, the trial judge refused to allow the Defendant to discharge his attorney and retain a new one. Instead, the trial judge compelled the Defendant to go to trial with a lawyer in whom he had totally lost confidence and who was no longer a lawyer of his choosing. At that trial, the Defendant was convicted. He was later sentenced to incarceration for 108 months.

After the Defendant was sentenced on October 31, 2007, he timely appealed his case to the United States Court of Appeals for the Eighth Circuit. The only issues presented on appeal were whether the district court had violated the Defendant's Sixth Amendment rights to the counsel of his own choosing, and to the effective assistance of counsel for his defense, when the trial court refused to permit the Defendant to discharge his attorney after that same trial court had severely criticized that attorney in its written order.

The Defendant's sole argument to the Eighth Circuit was that he had a constitutional right to fire his lawyer and to obtain a new one because he had good cause to do so. Neither in his brief, nor in his oral argument, did the Defendant ever claim that the trial court had abused its discretion by not granting

him a continuance or that he had ineffective assistance of counsel at his trial.

In his argument, the Defendant clearly pointed out the questions he was raising by his appeal: (1) Does a defendant have a constitutional right to fire a privately retained lawyer who he believes is not effectively representing him? (2) Does a defendant have a Sixth Amendment right to replace a private lawyer with another lawyer he believes will effectively represent him? (3) Does a defendant have a constitutional right to fire his lawyer when his reason for doing so is because the trial judge has severely criticized the performance and effectiveness of the lawyer by written court order?

Despite those specific issues being raised, the Court of Appeals completely ignored those questions. Instead, the Court of Appeals mischaracterized and side-stepped the very issues it was called upon to decide. In its opinion, the Court of Appeals ruled: "We review the denial of a request for a continuance in order to substitute counsel for an abuse of discretion." Even though this was neither an issue nor an argument raised by the Defendant, the Court of Appeals held that the district court did not abuse its discretion in failing to grant a continuance nor in denying the Defendant a new trial. The Court of Appeals, neither directly nor indirectly, addressed the important constitutional questions raised by the Defendant in his initial appeal. These are the questions he is

now asking the Supreme Court of the United States to address in this case.

REASONS FOR GRANTING CERTIORARI

1. The Sixth Amendment right to counsel of choice commands that the accused be allowed to be defended by the counsel he believes best

Inherent in the Sixth Amendment right to the assistance of counsel is the fundamental notion that a person accused of a crime is free to employ counsel of his or her own choice. A judge should be permitted little leeway in interfering with that choice.

There are few high court opinions on this issue, but *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557 (2006), suggests that this is an extremely important constitutional right. In that opinion, this Court specifically ruled that a trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to reversal of his conviction, and in so ruling, stated: "The right to counsel of choice, however, commands not that a trial be fair, but that a particular guarantee of fairness be provided-to-wit, that the accused be defended by the counsel he believes to be best." *Id.* at 140, 2559.

Most circuit cases interpreting this constitutional right have tempered a defendant's constitutional right to change lawyers with "the general interest in the prompt and efficient administration of justice."

See *United States v. Bowe,* 221 F.3rd 1183, 1189 (11th Cir. 2000); *Gandy v. Alabama,* 569 F.2d 1318, 1323 (5th Cir. 1978). However, this concern for the efficiency of the administration of justice is only an *interest*, and it is nowhere mentioned in the Constitution or the Bill of Rights.

Conversely, the Defendant's right to counsel of his own choosing is a *constitutional guarantee* embodied in the Sixth Amendment right to counsel. In any strict construction of this right, a court's administrative interest must take a back seat to the constitutional right that belongs to the accused.

The Defendant concedes this right is not absolute and that it can be "circumscribed in several important respects." *Wheat v. United States*, 486 U.S. 153, 159 (1988). The Defendant concedes that an accused's right to counsel should not be asserted in order to obstruct orderly judicial procedure or deprive courts of their inherent power to control the administration of justice. However, as this Court specifically stated in *Wheat, supra*:

> Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. See *Morris v. Slappy,* 461 U.S. 1, 13-14, 103 S.Ct. 1610, 1617-1618, 75 L.Ed.2d 610

(1983); *Jones v. Barnes,* 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

Id. at 159.

It is the position of the Defendant that the issue here is not one of a defendant merely wanting a lawyer of his own volition, but one in which the trial judge had already alerted him that his current trial counsel was ineffective. Thus, even under *Wheat,* he was entitled to a new lawyer who would be an effective advocate for his defense.

2. A trial court's concern for the administration of justice must give way to the Defendant's Sixth Amendment right to effective counsel

In addition, when a defendant's liberty is at state, and he has good cause to believe he is being poorly represented, then if justice is to be truly administered, he should always be permitted to fire his lawyer and to obtain a new one of his own choosing. To do otherwise is to allow administrative form to prevail over constitutional substance.

In this case, the Defendant had good cause to fire his lawyer. On May 22, 2007, the Court cited in a written order all of his lawyer's shortcomings for the Defendant to see. When the Defendant read this order, he was justifiably appalled by the language employed by the trial court concerning his lawyer's inadequacies.

This order, coupled with the lawyer's own admissions, made it blindingly clear that if the Defendant was to have the best defense the law allows, and the one guaranteed by the Sixth Amendment, he would have to get another lawyer.

Without regard to the fact that the Defendant went to trial, and without regard to the performance of his lawyer at that trial, the Defendant's rights were substantially and structurally violated. Win, lose or draw, a defendant should have the unfettered right to fire a lawyer who is not doing his job, without regard to a court's trial calendar. Win, lose or draw, a defendant should not be forced to be represented by a lawyer who he has already fired.

The right to fire a bad lawyer is as much a constitutional right as the right to hire a good one. This is the important but seldom addressed issue raised by this case.

If a defendant, whose very liberty is on the line, has good cause to fire his lawyer, no court should be permitted to prevent him from doing so. A defendant has a right to be defended by counsel who he believes to be the best. Under our system of jurisprudence, that determination belongs to the accused. It does not belong to the courts.

However, until this Court spells out for all other Federal and State Courts the breadth of the Sixth Amendment's right to "the Assistance of Counsel for his defence", referred to repeatedly as "a counsel of one's own choosing", then this right is going to be

increasingly threatened by judges who believe their calendar to be more important than the constitutional rights of a defendant.

CONCLUSION

The decision by the Eighth Circuit completely avoided the important constitutional questions that were raised by this Defendant. So also have most Circuits which seem to always avoid coming to grips with these issues by passing them off as issues relating to the right to a continuance versus judicial administration of justice, completely overlooking the right to effective counsel guaranteed by our Constitution.

Only this Court can truly delineate for the Circuit Courts and District Courts the importance of the right to counsel of one's own choosing.

This Court recently, after decades of debate, finally made clear the meaning of the Second Amendment's reference to the "right to bear arms." Now is the time for the Court to do the same with respect to the meaning of the Sixth Amendment. Just as Americans have a constitutional right to possess and own firearms, they also have a constitutional right to fire a bad lawyer and to hire a good one. That is what the Sixth Amendment is all about. This is one of the legacies the founding fathers gave to us and it must be enforced. The Defendant respectfully requests that

this Court grant his petition for Writ of Certiorari to the Eighth Circuit Court of Appeals.

DATED: July 23, 2009.

Respectfully submitted,

JAMES MARTIN DAVIS, ESQ.
500 Farnam Plaza
1623 Farnam Street
Omaha, NE 68102

Attorney for Petitioner
Ralph Cordy

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 07-3538

United States of America,	*	
	*	
Plaintiff-Appellee,	*	Appeal from the United
	*	States District Court
v.	*	for the District of
	*	
Ralph Cordy,	*	Nebraska.
	*	
Defendant-Appellant.	*	

Submitted: September 26, 2008
Filed: March 25, 2009

Before MURPHY, BOWMAN, and BENTON, Circuit Judges.

MURPHY, Circuit Judge.

Ralph Cordy was charged with possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B), convicted by a jury, and sentenced to 108 months in prison. Cordy appeals his conviction, claiming that he was denied both his Sixth Amendment right to the counsel of his choice and the effective assistance of

counsel. Cordy also appeals a sentencing enhancement imposed by the district court.[1] We affirm.

I.

The National Center for Missing and Exploited Children reported the existence of two child pornography websites to Immigration and Customs Enforcement (ICE) in 2004. After the ICE Cyber Crimes Center analyzed the websites' subscriber lists, Ralph Cordy was identified as a potential consumer of child pornography.

In the spring of 2006, agents from ICE and the United States Postal Inspection Service (USPIS), along with a deputy from the Douglas County, Nebraska Sheriff's Office instigated a "knock and talk" at Cordy's home in order to "freshen" some stale information. The agents informed Cordy that they were investigating credit card violations. In response to questions about his email address and suspicious credit card charges, Cordy asked whether the inquiry was leading toward child pornography. Informed that it was, Cordy maintained that he actively searched for child pornography so that he could report it to a watchdog website. Cordy could not name the website, however. He indicated that he occasionally received unsolicited emails with subject lines referencing

[1] The Honorable Laurie Smith Camp, United States District Judge for the District of Nebraska.

"Russian Lolitas" or "child pornography" but that he deleted them immediately.

Cordy denied the agents' request to search his residence. While agents from ICE and the USPIS secured the premises, the deputy sheriff obtained a search warrant. After serving Cordy with the warrant at his residence, the agents and deputy seized five computer towers, two laptop computers, and two external hard drives. Subsequently agents performed a forensic analysis of the seized hardware and identified in excess of 6000 images and 100 videos containing child pornography. Cordy was indicted for violating 18 U.S.C. § 2252(a)(4)(B), which prohibits the knowing possession of child pornography. Cordy retained a private attorney, Steven J. Lefler, to prepare his defense.

Cordy pled not guilty on October 18, 2006. That same day the district court issued its case management order and established the following deadlines: October 25, 2006 for discovery, November 7 for pretrial motions, and trial on December 11. On the day pretrial motions were due, Lefler moved to extend the deadline by two weeks, primarily because he had not yet received the search warrant and affidavit through discovery. Lefler's motion was granted, and the pretrial motion deadline was extended until November 22, 2006.

On November 21, 2006, Lefler filed a motion to suppress evidence seized as a result of the search and Cordy's statements made prior to the search. The

court held a suppression hearing in December, and the motions were subsequently denied. No objections were filed to the magistrate judge's Report and Recommendation, and it was adopted on March 5, 2007 by the district court which then rescheduled trial for March 27.

Lefler moved to continue the trial for an indeterminate period of time on March 7, 2007 because of a conflicting state court trial which had been previously scheduled. Counsel also informed the court that he planned to take a "sabbatical" on June 1, 2007. The government did not object to counsel's request for a continuance, and the magistrate judge granted the motion and rescheduled trial for April 24, 2007.

The parties filed a joint motion to continue trial on March 16, 2007. The district court conducted a hearing on April 17, 2007 to consider the joint motion. The government indicated that its forensic analysis was being hindered by its dependence on a busy secret service agent and a delay in receiving the necessary specialized software. It would thus be unable to complete its analysis until the first or second week of June. Defense counsel indicated that he would likely require two weeks to respond to and analyze the results of the government's forensic analysis and determine whether or not he needed to secure an expert. He also explained that his schedule presented a number of conflicts because he would be in Italy from May 18 until June 11, on jury duty in Arizona from June 22 through July 23, and in New

York from September 1 through November 15, 2007. After considering the time required for forensic analysis, the court expressed concern about defense counsel's scheduling conflicts in this case and others. Lefler indicated that he had stopped taking new cases in November of 2006, and the district court warned that it would not permit further extensions. At the conclusion of the hearing, the court rescheduled trial for July 2, 2007.

Lefler filed an array of pretrial motions on May 18, 2007, some five months after the discovery deadline. He indicated that he had "uncovered new approaches and theories concerning the government's prosecution," as well as a line of helpful cases including *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002). The motion sought to extend the motion deadline, to obtain independent analysis of the evidence seized from Cordy's residence, to declare 18 U.S.C. § 2252(a)(4)(B) unconstitutional, and to suppress compact discs seized from Cordy's residence depicting sexual contact between adults and children. He also requested the government's designation of its experts and a Daubert hearing.

Counsel's motion for independent analysis of seized physical evidence has particular relevance because of the Adam Walsh Child Protection and Safety Act, 18 U.S.C. § 3509(m) (2006). The Act provides in relevant part:

> (1) [A]ny property or material that constitutes child pornography . . . shall remain

> in the care, custody, and control of either the Government or the court.
>
> (2)(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography . . . so long as the Government makes the property or material reasonably available to the defendant.
>
> (B) [P]roperty or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility. . . .

Thus, under ordinary circumstances the defense would be limited to examining the contraband data in a government facility. In this case the data was stored in Omaha, Nebraska where Cordy was indicted.

Defense counsel and Cordy's expert concluded that the child pornography could have been placed onto his computer without his knowledge by means of a network intrusion or by a previous user. This would negate liability under the charging statute, and Lefler sought a forensic analysis of the seized data. Both the defense and the government indicated at trial that a thorough analysis of the data for this purpose would take approximately 35 days. Under the Adam Walsh Act the defense had access to the data at the government facility in Omaha, but the

defense expert was located in Virginia and claimed that Cordy would be "bankrupted" if the analysis had to be done in Omaha. As a result Lefler sought an order compelling the duplication of the contraband, relying on *United States v. Knellinger,* 471 F. Supp. 2d 640, 650 (E.D. Va. 2007) (ordering government to provide defense with copy of contraband data for analysis because alternatives were prohibitively expensive).[2] The government later provided a copy of the data to Cordy's defense for review at a government facility in Virginia as an accommodation.

The court denied most of the defense motions on May 22, 2007, saving the motion in limine for later consideration. In addition to being untimely, the court found the motions for independent analysis of evidence, Daubert certification, and expert designation to be procedurally deficient. With respect to the motion to extend the pretrial motion deadline, the court noted that it had already expired in November. The court further explained:

> Although defense counsel represents that he has uncovered "new" theories of defense, nothing in the motions filed with the Court indicates that he could not have uncovered these theories of defense prior to the expiration of the pretrial motion deadline. As

---

[2] It is unclear why counsel did not simply seek an order compelling the government to provide access to the data at a government facility in Virginia. *See United States v. Johnson,* 456 F. Supp. 2d 1016, 1020 & n.3 (N.D. Iowa 2006).

> defense counsel candidly stated, he has "no good reason for not having discovered" the newly found theories earlier.

On June 18, 2006, the government filed an unopposed motion to continue trial for three weeks due to the unavailability of an essential witness. The magistrate judge granted the government's request and rescheduled trial for July 24, 2007. On July 10, 2007, Lefler moved to withdraw as Cordy's attorney. A hearing on the motion was set for July 16.

At the July 16 hearing Lefler moved to continue the trial for an unspecified period of time because Cordy had fired him. Lefler indicated that Cordy had retained James Martin Davis as new counsel and that Davis would be unavailable on July 24, the scheduled trial date, because he was recovering from an angioplasty and was unable to prepare for trial on such short notice. Although Davis appeared at the hearing, he stated that he had not yet been hired by Cordy. Lefler also reported that Cordy had spent the previous month attempting to find a different attorney, only to lose her services at "the eleventh hour." Finally, Lefler noted that he had been tardy in discovering that it was his responsibility to procure hard drives so that the government could provide a duplicate of the contraband data for review by the defense in Virginia.

In considering the motion for continuing trial the court pointed out that it was being argued only a week before trial, that many continuances had

already been granted in the case, and that only now was Cordy asking for a delay so that he could retain new counsel:

> Court: [N]ow we are a week away from the trial and Mr. Cordy is asking for new counsel. And, of course, one concern that I have is a defendant has the right to the lawyer of his choice, especially when he's paying for that lawyer. But a defendant does not have a right to a continuance of the case. And certainly a defendant does not have a right to switch lawyers at the last minute in order to obtain a continuance of the case. So, Mr. Cordy, what is it, now a week before the trial of this case, that causes you to be so dissatisfied with Mr. Lefler's services that you believe that he can't represent you?
>
> Cordy: The main issue is . . . he hasn't got the evidence that my expert has requested fast enough to where we could build a defense. . . .
>
> Court: Well now, you were here when [the government] was explaining what the delay was and that delay really wasn't of any fault of Mr. Lefler's.
>
> Cordy: [W]ell, there was an incident where my expert asked for some information back in [April] and we never got that information from the prosecutor. . . . And it just doesn't seem like we have any time to build any kind of a defense. Plus, the matter of some of these motions that he filed and that were

> denied, I just started losing confidence in him.
>
> Court: It sounds to me like your frustration is more with the government and the court than with Mr. Lefler. I haven't heard you say one thing that Mr. Lefler has done wrong.

Later in the hearing, Lefler explained that Cordy's frustration with him stemmed primarily from the fact that he had been unable to provide the defense expert with timely access to the data. He also stated that his client's dissatisfaction had been developing for a "while" and was based in part on his late discovery of a line of relevant cases.

The court denied the motion for a continuance, explaining:

> [F]rankly I have not heard anything that persuades me that Mr. Lefler cannot do a very fine job representing the defendant in this case. Mr. Lefler is a very experienced criminal trial lawyer. He is fully capable of trying this case. And what I'm hearing is simply that the defendant has some frustration with the progress of the case, and perhaps with the court's rulings or the way that discovery has proceeded and the response of the government. But that's not Mr. Lefler's fault. I don't see that Mr. Lefler has in any way failed to provide professional representation for his client in this case.

On July 24 just prior to the commencement of trial, Cordy was rearraigned and informed that he

faced a maximum sentence of ten rather than five years. Lefler argued that Cordy "would have evaluated differently some of the plea negotiations" had he been aware of the length of sentence he faced. It is not clear from the record when Cordy first learned of this mistake. We note, however, that the prosecution asserted at rearraignment that the parties had discussed a plea agreement of 63 months at some previous point in time.

At trial the government called Brent Morral, the ICE case agent responsible for the Cordy investigation, who testified that shortly after he began questioning Cordy about credit card transactions the defendant asked whether the investigation was leading toward child pornography. William Hugelman, a Secret Service agent and computer forensic investigator, also testified to finding approximately 6,000 images and 100 videos containing child pornography on Cordy's hard drives. A portion of these images and videos was entered into evidence at trial. Hugelman testified that he had checked the hard drives for viruses and malicious software, but had not found evidence of either. Hugelman also stated that, considering the sheer quantity of child pornography he had found and the fact that it was organized in a clear fashion, he did not believe that network intrusion was responsible for the images on Cordy's computers. Finally, the government called a number of police officers who had previously been involved with child pornography investigations. These officers

confirmed that the images entered into evidence depicted real, rather than virtual, children.

The defense called only two witnesses – Cordy's wife and his defense expert, Steven Moshlak. Moshlak testified that the government's data analysis was deficient and did not reliably indicate whether Cordy was responsible for or had knowledge of the contraband on his computer. Moshlak also stated that had he been able to spend approximately 35 days examining a duplicate of the raw data, he could have definitively determined whether Cordy had accessed child pornography on his computer. Moshlak explained that he could have accomplished this through searching for evidence of network intrusion, viruses, and spyware and through examining internet usage, email correspondence, and deleted data. Since the government had not provided him with a duplicate of the raw data but only a "working copy," he was unable to conduct such a search he said. Moreover, Moshlak only received a copy of the data approximately one week before trial because counsel had not timely filed a pretrial motion for it and was therefore unable to determine whether Cordy was responsible for or had knowledge of the pornography on his computer.

At the conclusion of trial, the jury found Cordy guilty of violating 18 U.S.C. § 2252(a)(4)(B). Prior to adjourning until the sentencing hearing, the court spoke directly to Cordy about his counsel: "[W]hether you plan to get different counsel or not . . . it's my observation that Mr. Lefler did an outstanding job

providing you with representation throughout these proceedings."

II.

We review the denial of a request for a continuance in order to substitute counsel for an abuse of discretion. *United States v. Whitehead,* 487 F.3d 1068, 1071 (8th Cir.), *cert. denied,* 128 S. Ct. 693 (2007).

The Sixth Amendment right to counsel of one's choice "commands, not that a trial be fair, but that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes to be best." *United States v. Gonzalez-Lopez,* 548 U.S. 140, 146 (2006). This right "derives from a defendant's right to determine the type of defense he wishes to present." *United States v. Gonzalez-Lopez,* 399 F.3d 924, 928 (8th Cir. 2005), *aff'd*, 548 U.S. 140 (2006). "Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney." *Id.* (quoting *United States v. Mendoza-Salgado,* 964 F.2d 993, 1015-16 (10th Cir. 1992)). Individual attorneys may pursue very different litigation strategies with respect to plea bargaining, discovery, development of the theory of defense, and witness presentation. *Gonzalez-Lopez,* 548 U.S. at 150. Since the wisdom of a particular choice by defense counsel may very well affect the outcome of a case, "[a]s a general rule, defendants are free to employ counsel of their own choice." *Gonzalez-Lopez,* 399 F.3d at 928 (quoting

United States v. Lewis, 759 F.2d 1316, 1326 (8th Cir. 1985)).

That right is not absolute, however. *United States v. Vallery,* 108 F.3d 155, 157 (8th Cir. 1997). It is instead "circumscribed in several important respects." *Wheat v. United States,* 486 U.S. 153, 159 (1988). A defendant's "right to choice of counsel must not obstruct orderly judicial procedure or deprive courts of their inherent power to control the administration of justice." *Vallery,* 108 F.3d at 157. This is because "[t]rial judges necessarily require a great deal of latitude in scheduling trials." *Morris v. Slappy,* 461 U.S. 1, 11 (1983). The efficient operation of our judicial system depends upon gathering together a great number of citizens – lawyers, witnesses, jurors, and court personnel, for example – at a particular time and place. *Id.*

The grant of a continuance in order to substitute counsel has an impact on the court's calendar as well as all parties involved. For that reason, "trial courts are vested with broad discretion in matters of continuances" for the purpose of substituting counsel. *United States v. Larson,* 760 F.2d 852, 856 (8th Cir. 1985). In exercising its discretion, "the district court must carefully balance the defendant's right to be represented by the counsel of his choice against the court's interest in 'the orderly administration of justice.'" *Gonzalez-Lopez,* 399 F.3d at 929 (quoting *Urquhart v. Lockhart,* 726 F.2d 1316, 1319 (8th Cir. 1984)).

Among the factors for the trial court to balance in considering a motion for continuance are:

> (1) the nature of the case and whether the parties have been allowed adequate timing for trial preparation;
>
> (2) the diligence of the party requesting the continuance;
>
> (3) the conduct of the opposing party and whether a lack of cooperation has contributed to the need for a continuance;
>
> (4) the effect of the continuance and whether a delay will seriously disadvantage either party; and
>
> (5) the asserted need for the continuance, with weight to be given to sudden exigencies and unforeseen circumstances.

United States v. Issaghoolian, 42 F.3d 1175, 1177-78 (8th Cir. 1994) (citing *United States v. Coronel-Quintana,* 752 F.2d 1284, 1287 (8th Cir. 1985)).

Even though Cordy's case had complexities because of the nature of the evidence involved and the theory the defense sought to present, we conclude that the defense had adequate time for trial preparation. Counsel was retained in October of 2006 and trial commenced approximately ten months later in July of 2007. From the record it appears that counsel had access to the computer data needed to prepare the defense from at least the beginning of May until trial commenced at the end of July.

Cordy was not diligent in requesting a continuance for the purposes of substituting counsel. Cordy stated at the July 16, 2007 hearing that his discomfort with counsel stemmed from his failure to provide the defense expert earlier access to the data and to file his motions at an earlier point. It appears from the record, however, that Cordy should have been aware of these alleged shortcomings by the end of May, yet he waited until July 16, 2007 to seek a continuance in order to substitute counsel. Furthermore, at the April 17, 2007 hearing, Cordy was put on notice that counsel was occupied with other matters that could potentially limit the time he had available for defense preparation.

Although Cordy was dissatisfied that his defense expert did not have access to the data until shortly before trial, the prosecution was not at fault. By virtue of the Adam Walsh Act, the data was required to remain in the custody of the government. Although counsel might have obtained earlier and more cost effective access by the defense expert through pretrial motions, Cordy has not established that the grant of a trial continuance would have provided him with a successful defense. Moreover, a continuance on the eve of trial can exact significant costs on the administration and case management of a federal court, members of the jury pool, witnesses, and other litigants affected by the postponement.

Finally, with due consideration for sudden exigencies and unforeseen circumstances, the asserted need for the continuance cautioned against the grant.

Cordy sought a continuance in order to facilitate the substitution of counsel, but his dissatisfaction with counsel was neither sudden nor unforeseeable unlike the abrupt deterioration in counsel's health, for example, or the unexpected disappearance of a witness. It was also not clear when Davis would be ready to try the case were he to be retained.

We conclude that the denial of Cordy's motion for a continuance of trial in order to facilitate the substitution of counsel was not an abuse of discretion. Although Cordy may have been frustrated with Lefler's performance, "last minute requests to substitute counsel must not be allowed to become a tactic for delay." *United States v. Swinney,* 970 F.2d 494, 499 (8th Cir. 1992). Cordy's request to sever a ten month professional relationship two weeks before trial suggests that a desire for delay was the primary factor motivating the request. Although it would have been helpful if the district court had conducted a more thorough balancing test on the record, a trial court's "discretion is at its zenith . . . " when the defendant endeavors to replace counsel shortly before trial. *Whitehead,* 487 F.3d at 1071.

Cordy also raises an additional argument related to his counsel, claiming that he was denied his Sixth Amendment right to the effective assistance of counsel. Absent circumstances not presented by this case, a claim of ineffective assistance of counsel is not "cognizable on direct appeal. . . ." *United States v. Ramon-Rodriguez,* 492 F.3d 930, 941 (8th Cir.) (quotation marks omitted), *cert. denied,* 128 S. Ct.

938 (2007). Any such claim Cordy wishes to make must therefore be brought in a 28 U.S.C. § 2255 action. *See United States v. Hernandez,* 281 F.3d 746, 749 (8th Cir. 2002).

III.

Cordy finally contends that the district court erred in applying a five level sentencing guideline enhancement for possessing 600 or more images constituting child pornography under United States Sentencing Guidelines Manual § 2G2.2(b)(7)(D) (2006) because the underlying facts were not determined by a jury. We review the district court's construction and application of the sentencing guidelines de novo, and we review its factual findings regarding enhancements for clear error. *United States v. Wintermute,* 443 F.3d 993, 1004 (8th Cir. 2006).

Section 2G2.2(b)(7)(D) provides for a five level enhancement if the child pornography offense involves 600 or more "images." The guideline commentary defines images as "any visual depiction . . . that constitutes child pornography. . . ." § 2G2.2 cmt. n.4(A). Accordingly, to impose such a five level sentencing enhancement, the district court was required to find by a preponderance of the evidence that Cordy possessed 600 or more images constituting child pornography. Based on the record before us, we are satisfied that the district court made this finding. The sentencing court could not rely on the presentence report for findings because Cordy had objected to

them. *United States v. Poor Bear,* 359 F.3d 1038, 1041 (8th Cir. 2004). At the sentencing hearing, however, Agent Morral testified that he had examined approximately 6000 images found on Cordy's hard drives and that in his "opinion, the majority of those [images] portrayed child pornography." A district court can "take account of factual matters not determined by a jury and . . . increase the sentence in consequence." *Rita v. United States,* 127 S. Ct. 2456, 2465-66 (2007). Even though the sentencing discussion sometimes lacked precision, we conclude there was sufficient evidence in the record to support the district court's ultimate finding and that it was not clearly erroneous.

IV.

Accordingly, we affirm Cordy's conviction and sentence.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**CASE NO. 8:06CR321**
vs.	)	**MEMORANDUM AND ORDER**
RALPH CORDY,	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the following motions filed by the Defendant, Ralph Cordy: to extend the time for the filing of pretrial motions (Filing No. 33) supported by a brief (Filing No. 34); in limine (Filing No. 35); to produce independent analysis of physical evidence and protective order (Filing No. 36) supported by a brief (Filing No. 37); for a *Daubert* hearing (Filing No. 38); for designation of government experts (Filing No. 39); and for an order declaring 18 U.S.C. § 2252(a)(4)(B) unconstitutional (Filing No. 40).[1]

---

[1] The motions appearing as Filing Nos. 38, 39, and 40 were filed by counsel as "briefs" rather than "motions," and therefore they are not reflected in the Court's electronic filing system as "motions." Nevertheless, the documents are treated as "motions."

FACTUAL BACKGROUND

On October 16, 2006, Cordy was charged in a one-count Indictment with possession of child pornography pursuant to 18 U.S.C. § 2252(a)(4)(B). (Filing No. 1.) At Cordy's initial appearance on October 18, 2006, the pretrial motion deadline was scheduled for November 7, 2006. (Filing No. 6.) Cordy was released on bond. (Filing No. 7.) On November 8, 2006, the Court granted Cordy's motion to extend the pretrial motion deadline until November 22, 2006. Cordy's counsel requested the continuance for the following reasons: counsel had depositions scheduled in a state court case; discovery was provided one day late in the instant case; and a search warrant and search warrant affidavit were not originally included with the discovery in this case. (Filing No. 10.) On November 21, 2006, Cordy filed a motion to suppress. (Filing No. 12.) The motion was heard, and on February 8, 2007, Magistrate Judge Thomas D. Thalken issued his report and recommendation denying the motion to suppress. (Filing No. 22.) No objections were filed to the report and recommendation, and on March 5, 2007, this Court adopted the report and recommendation. (Filing No. 23.)

Also on March 5, 2007, trial was scheduled for March 27, 2007. (Filing No. 24.) On March 7, 2007, Cordy moved to continue the trial date because of a state court trial and a sabbatical that counsel would "hopefully" be taking beginning June 1, 2007. (Filing No. 26.) The request was granted, and trial was rescheduled to April 24, 2007. (Filing No. 27.) The

parties then filed a joint motion to continue the trial date, stating that discovery was not complete and additional forensic information was being sought by both parties. Defense counsel stated that he would be unavailable on the following dates: May 18, 2007, though June 11, 2007 (out of the country); June 15, 2007 (state court sentencing); June 22, 2007, possibly thorough July 23, 2007 (jury duty in Scottsdale, Arizona); and September 1, 2007, through November 15, 2007 (in New York City). (Filing No. 29.) On April 17, 2007, a hearing was held with respect to the joint motion. (Filing No. 32.) At the hearing, the Court learned that the government was awaiting the results of an investigation expected no later than June 10, 2007. The government was awaiting receipt of a computer program that would determine whether a virus might have inserted child pornographic images into Cordy's computer without his knowledge. This investigation was prompted by the possibility that the defense would obtain an expert to testify that the images in question were unknowingly placed in Cordy's computer. At the hearing, in light of this information, the Court granted the parties' motion to continue the trial date. The trial was rescheduled to July 2, 2007.

On May 18, 2007, defense counsel filed the motions now before the Court.

DISCUSSION

Motion to Extend (Filing No. 33)

The motion requests an additional week[2] to file pretrial motions because defense counsel has "uncovered new approaches and theories concerning the government's prosecution of cases involving digital imagery of children." The motions sought to be filed are the following:

- a motion to declare the statute unconstitutional for vagueness and overbreadth;[3]
- a motion in limine regarding CDs found at the Defendant's home during the search warrant;[4]
- a request for a "*Knellinger* protective order" to allow Defendant's expert access to computers and related equipment taken during execution of the search warrant;
- a request for a *Daubert* hearing;[5]

---

[2] Apparently, defense counsel is unaware that the pretrial motion deadline expired on November 22, 2006.

[3] This motion has been filed. (Filing No. 40.)

[4] This motion has been filed. (Filing No. 35.)

[5] This motion has been filed. (Filing No. 38.)

- a request for the government's experts, if any;[6] and
- if necessary, a motion to continue trial.

(Filing No. 33.)

Regarding the timing of any hearing that this Court might have set on the motion, defense counsel represented in the motion that he is unavailable on the following dates: from May 18, 2007, through June 10, 2007 (in Italy); on June 25-26, 2007 (jury duty in Scottsdale, Arizona); and June 27 through 28, 2007 (oral argument in the state supreme court).

The pretrial motion deadline of November 22, 2006 was not extended. (Filing No. 10.) The order continuing trial did not continue the pretrial motion deadline. (Filing No. 27.) The motion to extend the pretrial motion deadline now before the Court was filed on May 18, 2007, almost six months after the deadline for filing pretrial motions expired. (Filing No. 33.)

The applicable local rule of practice provides that a pretrial motion deadline "shall be strictly enforced unless the court grants an extension of time." NECrimR 12.3(a). Furthermore, the rule states that "[a]bsent good cause shown, a motion for an extension of time to file pretrial motions must be made within the time set for the filing of pretrial motions. Motions

---

[6] This motion has been filed. (Filing No. 39.)

for extensions of time to file pretrial motions will be granted only upon a showing of good cause." *Id.*

The motion to extend the pretrial motion deadline is denied as untimely, and the motion fails to show good cause for allowing the request outside of the period allowed for filing pretrial motions. Moreover, even if the Court were to entertain the merits, the motion fails to set forth good cause for an extension. Although defense counsel represents that he has uncovered "new" theories of defense, nothing in the motions filed with the Court indicates that he could not have uncovered these theories of defense prior to the expiration of the pretrial motion deadline. As defense counsel candidly stated, he has "no good reason for not having discovered" the newly found theories earlier. For example, defense counsel only recently discovered *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002) and *Free Speech Coalition v. Reno,* 198 F.3d 1083 (9th Cir. 1999).[7] Defense counsel also cites to a more recent case, *United States v. Knellinger,* 471 F. Supp. 2d 640 (E.D. Va. 2007). In *Knwellinger,* the court addressed 18 U.S.C. § 3509(m),[8]

---

[7] In both cases, §§ 2256(8)(B) and 2256(8)(D) were found to be unconstitutionally vague and overbroad. *Ashcroft, 535 U.S.* at 253; *Reno,* 198 F.3d at 1097. Neither decision addressed § 2252(a)(4)(B), the statute that Cordy argues is unconstitutional. (Filing No. 40.)

[8] 18 U.S.C. 3509(m) prohibits the reproduction of child pornography. Specifically, § 3509(m) provides that in criminal proceedings child pornographic images shall remain in the government's custody notwithstanding Federal Rule of Criminal

(Continued on following page)

enacted as part of the Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat. 587 (2006), which was signed into law on July 27, 2006. Section 3509(m) prohibits the reproduction of child pornography. Specifically, § 3509(m) provides that in criminal proceedings child pornographic images shall remain in the government's custody notwithstanding Federal Rule of Criminal Procedure 16 discovery procedures, provided that the material is reasonably available to the defense. "Reasonable availability" is defined as "ample opportunity for the inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial." 18 U.S.C. § 3509(m)(2)(B). The court found § 3509(m) constitutional on its face. *Id.* at 649-50. The court found the as-applied challenge moot, because in light of unrebutted testimony indicating the need for a copy of the images to be supplied to the defense the court ordered pursuant to § 3509(m)(2)(A) that a copy be provided. *Id.* at 645-50.

Although defense counsel rests "new" defense tactics on *Knellinger*, the motion to extend is

---

Procedure 16 discovery procedures, provided that the material is reasonably available to the defense. "Reasonable availability" is defined as "ample opportunity for the inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial." 18 U.S.C. § 3509(m)(2)(B).

nevertheless denied. The *Knellinger* case was distinguished in *United States v. Renshaw,* No. 1:05-CR-00165, 2007 WL 710239 (S.D. Ohio Mar. 6, 2007) as a case involving a situation in which the evidence showed that the defendant would have been "forced to incur cost-prohibitive expenses to transport expert equipment to a government facility," and therefore the government could not provide the required ample opportunity for examination of the evidence. *Id.* at *1. The *Renshaw* court concluded that a similar record was not present in that case, and therefore the court could not conclude that § 3509(m) was unconstitutional on its face or as applied. *Id.; Accord United States v. Sturm,* No. 06-CR-00342-LTB, 2007 WL 1453108, at *6 (D. Colo. May 17, 2007); *United States v. O'Rourke,* 470 F. Supp. 2d 1049, 1061-63 (D. Ariz. 2007); *United States v. Johnson,* 456 F. Supp. 2d 1016, 1019-20 (N.D. Ia. 2006).

Lastly, the Defendant refers to an argument that Cordy cannot be expected to know the difference between a digitally altered photograph and an actual child. (Filing No. 34.) This defense is not a novel one. *See United States v. Horn,* 187 F.3d 781, 789 (8th Cir. 1999) (stating that the element of knowledge under § 2252(a)(4)(B) is satisfied by evidence showing that a defendant knew or had reason to know that the images include minors).

For the reasons discussed, the motion to extend is denied.

In Limine (Filing No. 35)

The motion in limine was filed prematurely. The Court's progression order requires that motions in limine be filed no earlier than 14 days prior to trial and no later than two business days before trial. (Filing No. 6, ¶ 4.) However, the motion in limine will be held in abeyance and decided in chambers at the pretrial meeting to be held at 8:30 a.m. on the first day of trial.

Independent Analysis of Physical Evidence and Protective Order

The motion for independent analysis of physical evidence and protective order requests, pursuant to the Defendant's Fifth Amendment rights to due process and a fair trial and Sixth Amendment right to counsel, production of the images to the defense "without a case agent 'babysitting' the defense." (Filing Nos. 36, 37.) This motion is based on the *Knellinger* case discussed above in conjunction with the Defendant's motion to extend the pretrial motion deadline. For the reasons discussed in that portion of this memorandum and order, including the lack of any showing in Cordy's case that the material in question is not reasonably available,[9] the motion for

---

[9] Similarly, the defense offers no showing why the evidence cannot be viewed in the company of a government agent or attorney thereby avoiding chain of custody difficulties.

independent examination of physical evidence and protective order is denied.

Daubert *Hearing*

The *Daubert* motion is unspecific, stating only that the defense wishes to "determine whether or not the government's experts meet the Daubert requirements." (Filing No. 38.) Defense counsel then requests that the motion be "treated as its brief," because the motion does not contain "any unusual aspects." (*Id.*)

The motion is denied. The motion is untimely. NECrimR 12.3(a). Moreover, the motion contains no specifics related to this case. Finally, the motion is unsupported by a brief as required by the Court's progression order at Filing No. 6, ¶ 4 and NECrimR 12.3(b)(1), and therefore is deemed waived.[10] The Defendant's request essentially to suspend the requirement of an accompanying brief is denied.

Designation of Government's Experts

Without discussion, the Defendant moves for an order requiring the government to designate its expert witnesses by a date certain. (Filing No. 39.)

---

[10] A motion may be deemed abandoned when not accompanied by a brief. NECrimR 12.3(b)(1).

The record does not indicate whether the Defendant requested Rule 16 discovery. However, there is an open file policy (Filing No. 7) and the government is under a continuing duty to disclose pursuant to Federal Rule of Criminal Procedure 16(c). Finally, the Defendant has not complied with NECrimR 12.3(b)(3) requiring: a statement verifying that defense counsel conferred with counsel for the government in a good faith effort to resolve the issue; and a statement that the parties have not been able to resolve the matter. The showing must include the time, date and place of any such communications and the names of persons participating in those discussions. NECrimR 12.3(b)(3).

CONCLUSION

For the reasons discussed, the Defendant's motion in limine is held in abeyance pending the pretrial meeting. Otherwise, the Defendant's motions are denied.

IT IS ORDERED:

1. The Defendant's motion in limine (Filing No. 35) is held in abeyance as described in the memorandum; and

2. The following motions filed by the Defendant are denied: motion to extend time (Filing No. 33); motion to produce independent analysis of physical evidence and protective order (Filing No. 36); motion for a *Daubert* hearing (Filing No. 38); motion

for designation of government experts (Filing No. 39); and motion for an order declaring 18 U.S.C. § 2252(a)(4)(B) unconstitutional (Filing No. 40).

DATED this 22nd day of May, 2007.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA **Plaintiff**	**Case Number** **8:06CR321-001**
V.	**USM Number 21164-047**
RALPH CORDY **Defendant**	**JAMES M. DAVIS** **Defendant's Attorney**

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THE Defendant, was found guilty on count I of the Indictment after a plea of not guilty on July 26, 2007.

ACCORDINGLY, the Court has adjudicated that the Defendant is guilty of the following offense:

Title, Section & Nature of Offense	Date Offense Concluded	Count Number
18:2252(a)(4)(B) POSSESSION OF CHILD PORNOGRAPHY	April 5, 2006	i

The Defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Following the imposition of sentence, the Court advised the Defendant of the right to appeal pursuant to the provisions of Fed. R. Crim. P. 32 and the provisions of 18 U.S.C. § 3742(a) and that such Notice of Appeal must be filed with the Clerk of this Court within ten (10) days of this date.

IT IS ORDERED that the Defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the Defendant shall notify the Court and United States attorney of any material change in the Defendant's economic circumstances.

Date of Imposition of Sentence:
October 30, 2007

s/ Laurie Smith Camp
United States District Judge

November 1, 2007

IMPRISONMENT

The Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **108 months**.

The Court makes the following recommendations to the Bureau of Prisons:

1. Defendant shall be given credit for time served.

2. That the Defendant participate in the Sex Offender Treatment Program at FCI Butner, NC, after treatment is completed the Defendant may be housed at a facility as close to Omaha, Nebraska as possible.

The Defendant is remanded to the custody of the United States Marshal.

ACKNOWLEDGMENT OF RECEIPT

I hereby acknowledge receipt of a copy of this judgment this ___ day of _____, ___

_____
Signature of Defendant

RETURN

It is hereby acknowledged that the Defendant was delivered on the ___ day of _____, ___ to _____, with a certified copy of this judgment.

_____
UNITED STATES WARDEN

By: _____

NOTE: The following certificate must also be completed if the Defendant has not signed the Acknowledgment of Receipt, above.

CERTIFICATE

It is hereby certified that a copy of this judgment was served upon the Defendant this ___ day of _____, ___

_____
UNITED STATES WARDEN

By: _____

SUPERVISED RELEASE

Upon release from imprisonment, the Defendant shall be on supervised release for a term of **3 years**.

The Defendant shall report to the probation office in the district to which the Defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The Defendant shall not commit another federal, state or local crime.

The Defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

The Defendant shall not unlawfully possess a controlled substance. The Defendant shall refrain from any unlawful use of a controlled substance. The Defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.

If the judgment imposes a fine or restitution, it is a condition of supervised release that the Defendant

pay in accordance with the Schedule of Payments sheet of this judgment.

The Defendant must comply with standard conditions that have been adopted by this Court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The Defendant shall not leave the judicial district without the permission of the Court or probation officer;
2. The Defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The Defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The Defendant shall support his or her dependents and meet other family responsibilities;
5. The Defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The Defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The Defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use,

distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The Defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The Defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The Defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. The Defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. The Defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;

13. As directed by the probation officer, the Defendant shall notify third parties of risks that may be occasioned by the Defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the Defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The Defendant shall cooperate in the collection of DNA as directed by the probation officer, pursuant to the Public Law 108-405 (Revised DNA Collection Requirements Under the Justice for All Act of 2004), if such sample was not collected during imprisonment.

2. The Defendant shall submit his or her person, residence, office, or vehicle to a search conducted by a United States Probation Officer at any time; failure to submit to a search may be grounds for revocation; the Defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

3. The Defendant shall have no contact, nor reside with children under the age of 18, including their own children, unless approved in advance and in writing by the probation officer in consultation with the treatment providers. The Defendant must report all incidental contact with children to the probation officer and the treatment provider.

4. The Defendant shall not access or come within 500 feet of schools, school yards, parks, arcades, playgrounds, amusement parks, or other places used primarily by children under the age of 18 unless approved in advance and in writing by the probation officer.

5. The Defendant shall not be employed in or participate in any volunteer activity that involves contact with children under the age of 18, except

under circumstances approved in advance and in writing by the probation officer.

6. The Defendant shall not access, view or possess any pornographic sexually oriented or sexually stimulating materials, including visual, auditory, telephonic, or electronic media, computer programs or services. The Defendant shall not patronize any place where such material or entertainment is available.

7. The Defendant must have their residence and living situation approved in advance by the probation officer.

8. The Defendant shall sign releases of information to allow all involved in the assessment, treatment, and behavioral monitoring of the Defendant to communicate and share documentation with each other.

9. The Defendant shall register as a sex offender in accordance with state and federal law and in their county of residence. The Defendant shall not move to a different address without prior approval of the probation officer.

10. The Defendant shall successfully complete any sex offender diagnostic evaluations, treatment or counseling programs, and polygraph examinations as directed by the probation officer. Reports pertaining to sex offender assessments, treatments, and polygraph examinations shall be provided to the probation officer. Based on the Defendant's ability to pay, the Defendant shall pay the cost of diagnostic evaluations, treatment or counseling

programs, and polygraph examinations in an amount determined by the probation officer.

11. The Defendant shall participate in a victim awareness program as directed by the probation officer. Based on the Defendant's ability to pay, the Defendant shall pay for the costs of the program in an amount determined by the probation officer.

12. The offender shall submit/consent to quarterly searches of all electronic media as directed by the USPO with or without the cooperation of law enforcement.

13. The Defendant is prohibited from using or having access to any electronic media that has Internet service or photography capability. The Defendant will sign any and all releases of information as it relates to cell phone carriers.

14. The Defendant shall attend, successfully complete, and pay for any mental health diagnostic evaluations and treatment or counseling programs as directed by the probation officer.

15. The Defendant shall provide the probation officer with access to any requested financial information.

16. The requirement of 18 U.S.C. § 3583(d) regarding drug testing within fifteen (15) days of release on supervised release and at least two (2) periodic drug tests thereafter, is suspended until further order of the Court because the Presentence Investigation Report on the Defendant and other reliable sentencing information indicates a low risk of future substance abuse by the Defendant.

17. The Defendant shall report to the Supervision Unit of the U.S. Probation Office for the District of Nebraska between the hours of 8:00 a.m. and 4:30 p.m., 111 South 18th Plaza, Suite C79, Omaha, Nebraska, (402) 661-7555, within seventy-two (72) hours of release from confinement, and, thereafter, as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The Defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

Total Assessment	Total Fine	Total Restitution
$100.00		

The Court has determined that the Defendant does not have the ability to pay interest and it is ordered that:

interest requirement is waived.

FINE

No fine imposed.

RESTITUTION

No restitution was ordered.

SCHEDULE OF PAYMENTS

The Defendant shall pay the special assessment in the amount of $100.00.

The criminal monetary penalty is due in full on the date of the judgment. The Defendant is obligated to pay said sum immediately if he or she has the capacity to do so. The United States of America may institute civil collection proceedings at any time to satisfy all or any portion of the criminal monetary penalty.

Without limiting the foregoing, and during the Defendant's term of incarceration, the Defendant shall participate in the Bureau of Prisons' Financial Inmate Responsibility Program. Using such Program, the Defendant shall pay 50% of the available inmate institutional funds per quarter towards the criminal monetary penalty.

Without limiting the foregoing, and following release from prison, the Defendant shall make payments to satisfy the criminal monetary penalty in the following manner: (a) monthly installments of $100 or 3% of the Defendant's gross income, whichever is greater; (b) the first payment shall commence 30 days following the Defendant's discharge from incarceration, and continue until the criminal monetary penalty is paid in full; and (c) the Defendant shall be responsible for providing proof of payment to the probation officer as directed.

Any payments made on the outstanding criminal monetary penalty shall be applied in the following order of priority: special assessment; restitution; fine; and other penalties. Unless otherwise specifically ordered, all criminal monetary penalty payments, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be made to the clerk of the Court. Unless otherwise specifically ordered, interest shall not accrue on the criminal monetary penalty.

All financial penalty payments are to be made to the Clerk of Court for the District of Nebraska, 111 S. 18th Plaza, Suite 1152, Omaha, NE 68102-1322.

The Defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The Defendant shall inform the probation officer of any change in his or her economic circumstances affecting the ability to make monthly installments, or increase the monthly payment amount, as ordered by the Court.

The Defendant is restrained from transferring any real or personal property, unless it is necessary to liquidate and apply the proceeds of such property as full or partial payment of the criminal monetary penalty.

CLERK'S OFFICE USE ONLY:

ECF DOCUMENT

I hereby attest and certify this is a printed copy of a document which was electronically filed with the United States District Court for the District of Nebraska.

Date Filed: _____

DENISE M. LUCKS, CLERK

By _____ Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	]	8:06 CR 321
Plaintiff,	]	MOTION TO WITHDRAW
vs.	]	
RALPH CORDY,	]	
Defendant.	]	

COMES NOW, the undersigned and moves the Court for an order allowing him to withdraw as attorney for the reason that Defendant has fired him and has hired James Martin Davis. If necessary, the undersigned is requesting a hearing.

RALPH CORDY, Defendant

By s/ Steven Lefler

Steven Lefler, #15434
Lefler Law
Attorney for Defendant
1823 Harney Street, #1018
Omaha, NE 68102
Tele: 402 342-4433
Fax: 402 341-7003
Email: leflerlaw@hotmail.com

CERTIFICATE OF SERVICE

I hereby certify that on July ___, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Mike Norris, Omaha, Nebraska.

By s/ Steven Lefler

Steven Lefler, #15434
Lefler Law
Attorney for Defendant
1823 Harney Street, #1018
Omaha, NE 68102
Tele: 402 342-4433
Fax: 402 341-7003
Email: leflerlaw@hotmail.com